In the Supreme Court of the United States.

OCTOBER TERM, 1902.

A. D. JAMES, UNITED STATES MARSHAL for the Western District of Kentucky, and the United States, appellants,
v.
HENRY BOWMAN.
No. 213.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Western District of Kentucky, discharging on *habeas corpus* the appellee, Bowman, from the custody of the appellant, James, United States marshal for that District.

Bowman, together with one Harry Weaver, was indicted in the District Court for a violation of section 5507 of the Revised Statutes of the United States, which provides:

> SEC. 5507. Every person who prevents, hinders, controls, or intimidates another from

> exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

The indictment charged that at an election for a Representative in Congress held in the Fifth Congressional District of Kentucky on November 8, 1898, certain persons therein named, and others whose names were unknown to the grand jury, "men of African descent, colored men, negroes, and not white men," citizens of the United States and of the State of Kentucky and legally qualified to vote under the laws of both, and "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment," were prevented by the accused, by means of bribery, from exercising such right.

In default of bail, Bowman was committed to the custody of the marshal to await his trial. He thereupon applied to the District Court for a writ of *habeas corpus*, on the ground that section 5507 was in violation of the Constitution of the United States and void. Although entertaining no doubt of the constitutionality of the statute in its broadest aspects, the District Court felt constrained to accept the decision of the Circuit

Court of Appeals for the Sixth Circuit in *Lackey* v. *United States* (107 Fed. Rep., 114)—in which section 5507, as applied to bribery at State elections, had been declared unconstitutional—as conclusive of the question raised by the petitioner, and therefore ordered his discharge. From that judgment the marshal and the United States have appealed to this court.

ASSIGNMENTS OF ERROR.

1. The District Court erred in holding that said Henry Bowman was in the custody of the United States marshal in violation of the Constitution of the United States, and in discharging Bowman from the custody of the marshal.

2. The judgment of the District Court is contrary to law and the Constitution of the United States.

3. The District Court erred in holding that section 5507 of the Revised Statutes was and is in violation of the Constitution of the United States and therefore void, and on that account the imprisonment and detention of Bowman by the marshal was in violation of the Constitution and laws of the United States, and in discharging him from the custody of the marshal.

JURISDICTION.

An appeal lies direct to this court from the judgment of a District Court in a *habeas corpus* case where the constitutionality of a law of the United States is drawn in question, under section five of the Circuit Court of Appeals act. (26 Stats., 826.)

Rice v. *Ames* (180 U. S., 371, 373–4).
Cross v. *Burke* (146 U. S., 82, 88).

It is well settled that a writ of *habeas corpus* is a civil proceeding, even when instituted to arrest a criminal prosecution.

Ex parte Tom Tong (108 U. S., 556, 559).
Farnsworth v. *Montana* (129 U. S., 104, 113).

An appeal will therefore lie to review the order of the court discharging the petitioner.

Virginia v. *Paul* (148 U. S., 107, 123–124).

ARGUMENT.

I.

THE QUESTION INVOLVED.

The question presented by the facts of this case is the constitutionality of section 5507, Revised Statutes, *as applied to Congressional elections.*

In disposing of the case upon the authority of *Lackey* v. *United States*, the District Court said (Rec., 26):

> Some suggestion has been made that the indictment in the *Lackey* case had reference to a mere State election, and that a different rule might apply here, where the election was for a Representative in Congress, but I am clearly of opinion that such a distinction is wholly unfounded, and that the operation of the Fifteenth Amendment is not limited to Congressional elections, but obviously extends to all elections where the elective franchise is exercised in public affairs.

The District Court erred in thus confounding the authority of Congress in respect of these two very differ-

ent classes of elections. Undoubtedly, the Fifteenth Amendment was intended to apply to State as well as Federal elections; but it does not follow that legislation with respect to the one class is dependent upon its validity with respect to the other. The power of Congress over Federal elections is not derived primarily or entirely from the Fifteenth Amendment, which is said to be the exclusive source of its authority to interfere at State elections, but comes from other provisions of the Constitution. (*Ex parte Yarbrough*, 110 U. S., 651.) In the one case, the only question is whether an enactment of Congress is "appropriate legislation" to enforce the Fifteenth Amendment. If not, it is unconstitutional, so far as State elections are concerned. But its validity, as applied to Congressional elections, may be sustained upon other grounds. In *Lackey* v. *United States*, the Circuit Court of Appeals emphasized the fact that that case related to a "purely State election." For that reason, it was stated, the views expressed by this court in *Ex parte Yarbrough* did not apply, since all that was there said had reference to elections at which Congressmen were chosen.

In *United States* v. *Reese* (92 U. S., 214), section 4 of the Enforcement Act of May 31, 1870 (16 Stats., 140), afterwards reenacted as section 5506 of the Revised Statutes, and which provided for the punishment of any person who should, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, etc., or should combine with others to hinder, delay,

prevent, or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election, was held to be unconstitutional. In that case, which related to offenses committed at a *State* election, the United States, as was expressly pointed out by the court, abandoned all claims except those arising out of the enforcement of the Fifteenth Amendment. The sole question, therefore, considered by the court was whether the statute in question was "appropriate legislation" to enforce that Amendment. The court held that it was not.

In *United States* v. *Munford* (16 Fed. Rep., 223) the constitutionality of section 5506, Revised Statutes, as applied to *Congressional* elections, was before the Circuit Court of the United States for the Eastern District of Virginia. Referring to the decision of this court in *United States* v. *Reese*, the Circuit Court said (pp. 228–9):

> The court in the *Reese* case decided that section 5506 was not appropriate legislation to enforce the Fifteenth Amendment. The section said nothing of race, color, and previous condition. It was at a municipal election, and therefore was not within the power of Congress under section 4, Article 1, of the Constitution, which gives power to Congress over Federal elections. *Had the same crime been committed at a Federal election* the court would, we think, have found the authority for section 5506 under the fourth section, Article 1, above recited.

In his concurring opinion in that case, Judge Hughes said (16 Fed. Rep., 229):

> We are dealing here with an offense charged to have been committed, in a Federal election, in violation of this section 5506; and the defense asks us to base our ruling, in this case of a Federal election, upon the ruling of the Supreme Court in a case arising in a town election under the act of 1870, in which that court not only carefully confined itself to the case before it, but protested by iteration that it was not considering any law in its relation to Federal elections. *Its opinion in Reese et al. was expressly confined to section 4 of the act of 1870 in its relation to State elections,* and the court held that section not to be within the purview of the Fifteenth Amendment of the Constitution. But, even as to that section, the court did not, and took especial pains not to, decide that the section was beyond the purview of the first Article of the Constitution. The Supreme Court has never decided that section 4 of the act of 1870 was unauthorized by Article 1. Much less has it ever decided that section 5506 of the Revised Statutes was unauthorized by Article 1. This Article and the Fifteenth Amendment are as follows; and it will be seen that the former refers only to Federal elections, while the latter refers to all elections, Federal, State, and municipal, but limits legislation under it to the prevention of discrimination between voters on account of race, color, and previous condition. The result is that Congress has general powers of legisla-

tion concerning Federal elections, but can legislate concerning State and municipal elections solely for the purpose of preventing discriminations on account of race.

As it is not thought probable that the court will, on this record, enter into a consideration of the power of Congress over State elections, it is not necessary to discuss the constitutionality of section 5507 in that respect. If, however, the court should desire to consider that question, I shall be glad to file an additional brief in respect thereto.

But it is proper to suggest briefly here, as fortifying the argument in the abstract, that the *general* right of suffrage, at State as well as Federal elections, is contemplated by the law if the crucial discrimination occurs, because—

1. The Constitution so indicates—

(*a*) The language of the Fifteenth Amendment being unqualified, "the right * * * *to vote;*"

(*b*) The language of section 2 of the Fourteenth Amendment, on an associated subject and showing a cognate intention, including elections for State as well as Federal officers.

2. The statutes show that intention: e. g., section 2004 obviously applies to State elections and officers, and section 2010, although now repealed by the act of February 8, 1894 (28 Stat., 36), may be cited to show how the original intent, still apparent in section 2004, was followed up in other provisions of the act of 1870.

3. The clear inference from decisions of this court is to the same effect.

In the *Reese* case it was said (92 U. S., 218):

> It has not been contended, nor can it be, that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment.

In the *Yarbrough* case (110 U. S., 664), when the court said, "the Fifteenth Amendment of the Constitution * * * clearly shows that the *right of suffrage* was considered to be of supreme importance to the national government," etc., it is evident from the paragraphs following that the learned judge who delivered the opinion had passed on from exclusive consideration of the right to vote for a member of Congress.

II.

POWER OF CONGRESS OVER THE ELECTION OF ITS MEMBERS.

The extent of the authority possessed by Congress over its own elections has been conclusively determined by the decisions of this court.

Ex parte Siebold (100 U. S., 371).
Ex parte Clarke (100 U. S., 399).
Ex parte Yarbrough (110 U. S., 651).

In *In re Coy* (31 Fed. Rep., 794), which involved the constitutionality of sections 5511 and 5515 of the

Revised Statutes of the United States, Mr. Justice Harlan, at the Circuit, said (pp. 803–804):

> The authority of Congress to enact the statutes to which reference has been made, is no longer an open question in the courts of the Union. Such legislation is authorized by that provision of the Constitution which invests Congress with power to make regulations as to the time and manner of holding elections for Representatives in Congress, or to alter such regulations as the State prescribes—Article I, section 4. The requirement that officers of elections, at which such Representatives are voted for, shall perform the duties imposed by the State in regard to such elections, is the same, in legal effect, as if Congress had, in the first instance, and by direct legislation, imposed those duties upon those officers. It would be extraordinary indeed if the nation could not prescribe penalties for the nonperformance of duties, in regard to elections for Representatives in Congress, by those exercising the functions of officers at such elections. It is immaterial that such officers are appointed by the State. When supervising elections for Representatives in Congress, they can be reached by the power of the United States and punished for neglect of the duties they assume to discharge. These views are sustained by the elaborate judgments of the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S., 371; *Ex parte Clarke*, id., 399; and *Ex parte Yarbrough*, 110 U. S., 651, *in which the power of Congress*, either by direct legislation or by adopting the regula-

> tions established by the State, *to secure the integrity and freedom of elections, at which Representatives in Congress are chosen, is placed upon grounds that can not be shaken. Those cases cover the whole field of argument.*

The opinion of Mr. Justice Harlan, from which the above extract is made, appears as a note to the opinion of this court in *In re Coy* (127 U. S., 731, 733).

In *Ex parte Siebold* (100 U. S., 375) this court sustained the constitutionality of section 5515, Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for Representative in Congress, to neglect to perform or to violate any duty in regard to such election, whether required by a law of the State or of the United States, etc.; of section 5522, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; and of certain other sections authorizing the appointment of such supervisors and deputy marshals.

These sections were originally part of the Enforcement Act of May 31, 1870 (16 Stats., 140), and the supplement thereto of February 28, 1871 (Id., 433).

Siebold and four others were indicted in the Circuit Court of the United States for the District of Maryland for offenses alleged to have been committed by them

whilst acting as judges of election in the city of Baltimore at an election for Representative in Congress. Having been found guilty and sentenced to fine and imprisonment, they applied to this court for a writ of *habeas corpus*, alleging the unconstitutionality of the statutes.

The power of Congress to assume the *entire* regulation of the elections of Representatives was not questioned in the *Siebold* case. But it was urged that it had no authority to make partial regulations, to be carried out in conjunction with those made by the States, because, when exercised by Congress, such power was *exclusive*. The court held, however, that the power referred to might be exercised concurrently with the States, conflict being rendered impossible by reason of the paramount character of the regulations prescribed by Congress, which would supersede those made by the States so far as they were inconsistent therewith.

It was also objected that Congress had no authority to enforce State laws or to punish State officers, especially for violating the laws of their own State. But the court said (100 U. S., 387–388):

> As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfill duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfillment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due

> and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction—State and National. A violation of duty is an offense against the United States, for which the offender is justly amenable to that Government. No official position can shelter him from this responsibility. *In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject*, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box can not be made amenable to the United States.

To the contention that the duty of keeping the peace rested upon the State alone, and that Congress could not authorize the appointment by the Circuit Courts of the United States of special officers to attend Congressional elections for that purpose, the court said (100 U. S., 394–395):

> Here again we are met with the theory that the Government of the United States does not

> rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

The principles announced in the *Siebold* case were affirmed in *Ex parte Clarke*, *supra*, and *United States* v. *Gale* (109 U. S., 65, 66).

The cases just referred to, while instructive as to the extent of the authority possessed by Congress over its own elections, all related to offenses committed by officers of election charged with certain duties under the laws of the United States and therefore did not involve the precise question here presented. The case of *Ex parte Yarbrough* (110 U. S., 651), however, is directly in point, as it involved the power of Congress to punish *private individuals* for offenses committed at Congressional elections. The principles announced in that case are decisive of the questions presented by this record.

Yarbrough and seven other persons were indicted, tried, convicted, and sentenced to imprisonment by the Circuit Court of the United States for the Northern District of Georgia, on a charge of conspiracy, based upon sections 5508 and 5520 of the Revised Statutes,

whereupon they made application to this court for a writ of *habeas corpus*, upon the ground that the proceedings in the Circuit Court under which they were held were illegal.

The sections referred to are as follows:

> SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.
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> SEC. 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; each of such persons shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment, with or without hard labor,

> not less than six months nor more than six years, or by both such fine and imprisonment.

These sections come from the Enforcement Acts of May 31, 1870 (16 Stats., 140), and April 20, 1871 (17 Stats., 13), respectively.

Yarbrough and his associates were charged with having conspired to intimidate certain persons of African descent in the exercise of their right to vote for a member of Congress, in the execution of which conspiracy they beat, bruised, wounded, and otherwise maltreated them; and that they did this on account of their race, color, and previous condition of servitude, by going in disguise and assaulting them on the public highway and on their own premises, respectively. This was held to be a sufficient description of an offense embraced within the provisions of sections 5508 and 5520.

Speaking generally of the authority of the Federal Government over its own elections, the court, through Mr. Justice Miller, said (p. 657):

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this Government is anything more than a mere aggregation of delegated agents of other

> States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption.

Counsel in that case contended that in the absence of an *express* grant of authority to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law could be enacted by Congress. But the court repudiated the contention, characterizing it as "the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it." "The principle, if sound," said the court, "would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction." (p. 658).

After referring to the authority conferred upon Congress by Article I, section 4, of the Constitution, to make or alter the regulations which should be prescribed by the State legislatures, as to the times, places, and manner of holding elections for Senators and Representatives, and the action taken thereunder by Congress in changing the manner of electing Representatives from a general to a separate ticket and fixing the day on which such elections should be held throughout the United States, and also in requiring the two branches of the State legislature, when a Senator was to be elected, to meet in joint convention on a certain

day for that purpose, and continue to meet every day thereafter until a Senator was chosen, the court said (p. 661):

> Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud?

To the objection that the parties assaulted by Yarbrough and his associates were not officers of the United States, and therefore their protection by Congress did not stand on the same ground—reference having been made in the opinion to the unquestioned authority of the statutes enacted by Congress for the protection of such officers in the exercise of their duties—the court said (p. 662):

> But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or *the right which he is about to exercise is dependent on the laws of the United States.*
>
> In both cases it is the duty of that Government to see that he may exercise this right freely, and to protect him from violence while

> so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the Government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

As to the contention that the right to vote for a member of Congress was not dependent upon the Constitution or laws of the United States, but was governed by the law of the respective States, the court said (p. 663):

> If this were conceded, the importance to the General Government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the Government, it is as indispensable to the proper discharge of the great function of legislating for that Government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by the law of the United States, or by their united result.

The court, however, did not leave the question in this uncertain state. It proceeded (p. 663):

> *But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.*
>
> The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election.
>
> Its language is:
>
> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." (Article I, section 2.)
>
> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.
>
> It is not true, therefore, that electors for members of Congress owe their right to vote to the State law *in any sense which makes the exercise of the right to depend exclusively on the law of the State.*

Explaining the statement in *Minor* v. *Happersett* (21 Wall., 162), that "the Constitution of the United States does not confer the right of suffrage upon anyone," the court said (p. 664):

> The court was combatting the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. *But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution*, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

Having decided that the right to vote for a member of Congress was a right based upon the provisions of Article I, section 4 of the Constitution, giving Congress control over such elections, and that sections 5508 and 5520, Revised Statutes, were appropriate legislation to enforce and protect that right, it was not really necessary in the determination of the case for the court to consider the meaning and operation of the Fifteenth Amendment. Although the sections referred to were taken from the Enforcement Acts of

May 31, 1870, and April 20, 1871, and were primarily intended for the protection of the colored race, they contain no direct reference to that people, nor to discrimination on account of race, color, or previous condition, but apply equally to all citizens of the United States. The court referred to that Amendment, however, as showing that "the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States," and also to correct some erroneous impressions which had evidently been formed as to the meaning of what had been said in *United States* v. *Reese*. In the latter connection, it was said (p. 665):

> While it is quite true, as was said by this court in *United States* v. *Reese* (92 U. S., 214), that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional

provision of a State which should give the right of voting exclusively to white people, whether they be men or women. (*Neal* v. *Delaware*, 103 U. S., 370.)

In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

In the case of *United States* v. *Reese*, so much relied on by counsel, this court said in regard to the Fifteenth Amendment, that "it has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." This new constitutional right was mainly designed for citizens of African descent. *The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote* as to the colored citizen, *and to the right to vote in general* as to the right to be protected against discrimination.

The exercise of the right *in both instances* is *guaranteed by the Constitution*, and should be kept free and pure by Congressional enactments whenever that is necessary.

The court also said that the power of Congress to protect citizens of the United States in the exercise of their rights under the Constitution was not limited, as was its power under the first section of the Fourteenth

Amendment, to acts done under State authority, but extended to the acts of individuals as well (p. 666):

> For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that Amendment, *it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the Government itself.*

III.

PERSONS TO WHOM THE RIGHT OF SUFFRAGE IS GUARANTEED BY THE FIFTEENTH AMENDMENT.

Section 5507, Revised Statutes, here in question, provides for the punishment of every person who, by means of bribery or certain forms of threats, prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, "to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States."

In view of the decisions of this court in the *Yarbrough* and other cases, above referred to, the authority of Congress to protect voters at Federal elections against bribery and intimidation, by making such acts offenses against the United States, can not be questioned. But, it may be asked, who are the persons described in section 5507 as those to whom "the right of suffrage * * * is guaranteed by the Fifteenth Amendment?"

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

While this Amendment was chiefly designed for the further protection of the emancipated slaves, by indirectly conferring upon them the elective franchise, it is not limited, either in its terms or operation, to the negro race. (*Slaughter House Cases*, 16 Wall., 37, 71, 72.) All "citizens of the United States," of whatever race, color, or previous condition, are secured by its provisions against discrimination in the matter of voting. But, as the Fifteenth Amendment does not directly confer the right to vote (*United States* v. *Reese*, 92 U. S., 214), but that right is derived immediately from the State, which determines, in the first instance, the qualifications of all its voters, it follows that, in order to come within the protection of the Amendment, a citizen of the United States must be otherwise qualified to vote under the laws of his State. *Citizens of the United States, without regard to race, color, or previous condition of servitude, who are otherwise qualified to vote*, are, therefore, the persons, and the only persons, to whom the right of suffrage is guaranteed by the Fifteenth Amendment, and consequently the persons referred to in section 5507.

That this is the meaning to be attached to the language in question is shown by a reference to the act of 1870 (16 Stats. 140), from the fifth section of

which section 5507 was taken. As is well known, that act, like the Fifteenth Amendment, was primarily intended for the protection of the freedmen; but also, like that Amendment, it is not limited in its terms, nor can it be supposed that it was intended to be limited in its operation, to the colored race. It is entitled "An act to enforce the right of *citizens of the United States* to vote in the several States of the Union, and for other purposes;" and its first section provides:

> Be it enacted, etc., That *all citizens of the United States who are or shall be otherwise qualified by law to vote* at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, *without distinction of race, color, or previous condition of servitude;* any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

The propriety of referring to the act from which a section of the Revised Statutes is taken, for the purpose of ascertaining its meaning, where any ambiguity exists, has been often affirmed by this court.

In *Ex parte Crow Dog* (109 U. S., 556), it was necessary to determine whether the locality of a murder of which that Indian had been convicted was "Indian country," within the meaning of section 2145, Revised Statutes, extending the general laws of the United States for the punishment of crimes to that ter-

ritory. Section 2145 was taken from the Indian Intercourse Act of June 30, 1834 (4 Stats., 729, 733), the first section of which defined what should be deemed "Indian country." In this connection the court said (p. 560):

> Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new States, and by the organization of Territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, have, nevertheless, omitted all definition of what now must be taken to be "the Indian country." *Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force*, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. *It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force.* (Bramwell, L. J., in *Attorney-General* v. *Lamplough*, L. R. 3 Ex. D., 223–227; Hardcastle on Statutory Law, 217; *Bank for Savings* v. *Collector*, 3 Wall., 495–513; *Commonwealth* v. *Bailey*,

> 13 Allen, 531.) This rule was applied in reference to the very question now under consideration in *Bates* v. *Clark*, 95 U. S. 204, decided at the October term, 1877.

In *United States* v. *Le Bris* (121 U. S., 278), the same question was again before this court. Referring to section 1 of the act of June 30, 1834, defining the "Indian country," the court said (p. 280):

> This section was not reenacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by section 5596 of the revision; but still we held, in *Ex parte Crow Dog* (109 U. S., 556, 561), that it might be referred to for the purpose of determining what was meant by the term "Indian country," when found in sections of the Revised Statutes which were reenactments of other sections of this statute. * * * The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. *The reenacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested.*

In *United States* v. *Hirsch* (100 U. S., 33) the court said (p. 35):

> It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

See also *United States* v. *Bowen* (100 U. S., 508, 513).

It is also settled that the title of an act may be considered in determining the intention of the legislature.

Church of the Holy Trinity v. *United States* (143 U. S., 457, 462).

Coosaw Mining Co. v. *United States* (144 U. S., 550, 563).

The fact that the section in which an ambiguity is found is *penal* in its nature, and therefore to be construed strictly, does not preclude resort to the original act for the purpose of discovering the legislative intention. (*United States* v. *Lacher*, 134 U. S., 624, 626).

Applying these principles, and giving to the words in section 5507, Revised Statutes, the meaning they had in section 5 of the act of 1870, it is clear that the persons referred to as those "to whom the right of suffrage is guaranteed by the Fifteenth Amendment" are citizens of the United States, of whatever race, color, or previous condition, otherwise qualified to vote under the laws of their respective States, as stated in section 1 of the act of 1870.

But even if the question were to be determined independently of the act of 1870, the same conclusion would be reached. The necessary effect of the Fifteenth Amendment in prohibiting discrimination against citizens of the United States in the matter of voting because of their race, color, or previous condition is to secure or guarantee that right to all such citizens, of whatever color, white as well as black, who are otherwise qualified under the State law to exercise it. No other meaning can possibly be attributed to the language used.

In the *Yarbrough case* the court said (110 U. S., 665):

> This new constitutional right ["exemption from discrimination"] was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, *and to the right to vote in general* as to the right to be protected against discrimination. *The exercise of the right in both instances is guaranteed by the Constitution*, and should be kept free and pure by Congressional enactments whenever that is necessary.

But here we do not need to argue for the broadest contents of the Fifteenth Amendment. We are dealing in this case with colored persons, those for whom such rights were mainly designed. No defect in form, or even in substance, in the indictment was brought forward. The petitioner relied solely on the unconstitutionality of the law. Besides, as was said in *Ex parte Yarbrough*, jurisdiction only is involved, the writ of *habeas corpus* can not be converted into a writ of error, and this court will not inquire into the sufficiency of the indictment. Whether the indictment sets forth duly and correctly the statutory offense, "is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction." If that point may still be raised, it must be raised below.

Again, any doubt as to Federal control over State elections—as to the scope of national protection to the

right of suffrage in general—is eliminated, because the election was for a Representative in Congress.

The statute providing protection to those "to whom that right [of suffrage] is guaranteed by the Fifteenth Amendment to the Constitution of the United States," connects itself with the language and purpose of the Amendment, and indicates necessarily citizens of the United States whose right to vote is in any way interfered with or abridged on account of race, color, or previous condition of servitude. It is beyond question, under the decisions cited, that this Amendment operates not only as a negative protection, as a prohibition against the United States and the States, like the early Amendments against the former and the Fourteenth Amendment against the latter sovereignties; but also operates affirmatively against individuals, and supports legislation to that end. In this respect it resembles the Thirteenth Amendment, which is an absolute fiat against slavery, and would support all legislation necessary or proper to its suppression.

I have indicated the reasons why it can not be suggested that it does not appear under this indictment that these colored persons were bribed on account of their race, or in pursuance of a discrimination against their race. This court will take that averment (if necessary) as sufficiently appearing, as essentially inferred, or as waived, at least at this stage. There is no question here but constitutionality. And, respecting the purpose and reach of the amendment and the statute, *non constat* that the mere fact of bribery

operating on colored individuals susceptible to that base appeal, easily swayed by petty cupidity, and subjected to covert and conspiring political motives either to vote or not to vote (as the case might be), would not in itself constitute a discrimination on account of race, color, etc. For, as strengthening that thought, we are to remember what was said by Justice Miller for the court in the *Yarbrough* case, with the emphasis of reiteration, that not only violence but corruption is to be guarded against—"the temptations to control these elections by violence and by corruption is a constant source of danger;" the destiny of the country is "at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other." (110 U. S., 666, 667.) The learned Justice was considering sections of the statutes which presented the notion of conspiracy and violence rather than corruption; and yet he went out of his way (so to speak) to emphasize the danger of bribery; and the provisions then in the statutes most forcibly directed against bribery are section 5507 now before the court, and the other sections held to be unconstitutional (in the Reese case) before the Yarbrough case was decided. And on this point the fact that section 5507 was *not* repealed by the act of 1894 is instructive and significant.

In conclusion, I recall the court's attention with especial emphasis to the great principle deliberately decided by a unanimous court in the Yarbrough case, viz, that in elections for members of Congress the

power of Congress is ample and untrammeled under section 4 of Article I of the Constitution (110 U. S., 661, 662):

> Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud?
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> But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the *pure*, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.

I submit that the judgment below should be reversed and the appellee be remanded to the custody of the marshal in default of bail, and pending trial.

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W. R. HARR.

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